89-1940

No.

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1989

EDWARD TEIGHMAN, et al.,

Petitioners,

v.

ERIC KOLKHORST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LIST OF PARTIES

The parties to the proceedings below were the petitioners, Edward Pitcher, Commissioner of the Baltimore City Police Department, and the Baltimore City Police Department, and the respondent, Eric Pelham.

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No.

In The

Supreme Court of the United States

October Term, 1959

EDWARD TILGHMAN, ET AL.,

Petitioners,

v.

ERIC KOLKHORST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

As a result of a settlement reached in an earlier and unrelated case, Kindrat v. Powerleau, No. 79-2998 (D. Md. 1979), the Department, which employs approximately 2000 police officers, established a one hundred person limit on the number of officers who are permitted to join an active military reserve unit. Under the Department's rules, after the one hundred person limit is reached, other officers who request to join the reserves are placed on a waiting list until an opening occurs. An exception is made for those new hires who, at the time of their application for employment with the Department, are members of an active military reserve unit. These individuals are not barred from remaining an active reservist even if the one hundred person maximum has been reached. At the time Kolthorst applied for his job with the Department, 120 officers were members of an active reserve unit, and 15 officers were on the waiting list.

The Department justified its policy limiting the number of police officers who are allowed to join active military reserve units on these considerations: the activation of local reserve units during civil disturbances or other emergencies depletes the Department's manpower to a point which can jeopardize public safety; and, the majority of reserve training exercises take place during the summer months, when vacation and other normal leave requests are also highest, thereby impacting upon the available manpower for conducting routine police operations.

When Kolkhorst completed his application for employment with the Department, he explained his situation to Department employees who instructed him to indicate on the form that he was not a member of an active military reserve unit which regularly drilled, and that he had no periodic training obligations. Thereafter, in December of 1985, Kolkhorst applied for permission from

the Department to join an active military reserve unit. The Department failed to respond to his applications. On February 1, 1986, Kolkhorst accepted a three-year assignment to a Selected Reserve Unit. On February 4, 1986, Kolkhorst again submitted a request for permission to join an active unit. The Department denied this request, but placed Kolkhorst on its waiting list for openings on the one hundred person reservist list.

Kolkhorst received orders to report to Camp Lejeune in North Carolina for annual military training between July 31 and August 16, 1986. Kolkhorst informed his superior officers in late May of his upcoming training exercises. Subsequently, the Department began to inquire into Kolkhorst's reserve status, and on July 8, 1986, the Department orally informed Kolkhorst that his request for leave in order to train had been denied. On July 23, 1986, Kolkhorst

received a Departmental memorandum directing him to remove himself immediately from active military reserve status. Kolkhorst complied with this directive on the following day.

On October 3, 1986, Kolkhorst brought suit in the United States District Court for the District of Maryland, claiming that his right to become an active member of a military reserve unit under the Veterans' Reemployment Rights Act, 38 U.S.C. Sections 2021-2026 ("VRRA"), was violated by the Department's policy restricting the number of police officers who were eligible to serve as active reservists. Kolkhorst sought both declaratory and monetary relief. On June 13, 1988, the lower court granted summary judgment in favor of Kolkhorst. By a revised order dated February 15, 1989, the district court also awarded Kolkhorst damages totalling $4,164 as compensation for lost income and benefits that he would have earned by participating in reservist training.

The Fourth Circuit affirmed, holding that the Department's refusal to grant Kolkhorst leave for military reservist training violated 38 U.S.C. Section 2024(d). The Court held that the reasonableness, vel non, of Kolkhorst's request, or its impact upon the Department, was irrelevant in determining whether Section 2024(d) was violated, stating that "[t]here was nothing in the VRRA, its legislative history, or the Monroe [v. Standard Oil Company, 452 U.S. 549 (1981)] decision to indicate that a reservist is entitled to a leave of absence in order to participate in military training only if the request is reasonable." See Appendix, p. 19a, infra (emphasis in original). The Court held that the reasonableness standards that other courts of appeals have construed from the VRRA are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units.

The Court went on to hold, however, that even if a standard of reasonableness is applied to Section 2024(d), Kolkhorst's request for training leave was reasonable and the Department's policy limiting to 100 the number of police officers that are eligible to serve as active military reservists is unreasonable per se under any possible formulation of the test.

REASONS FOR GRANTING THE WRIT

THE FOURTH CIRCUIT'S HOLDING THAT A RESERVIST HAS AN ABSOLUTE RIGHT TO MILITARY LEAVE, REGARDLESS OF THE REASONABLENESS OF HIS REQUEST OR ITS IMPACT ON THE EMPLOYER, IS IN CONFLICT WITH HOLDINGS BY OTHER COURTS OF APPEALS

The Fourth Circuit's holding that the reasonableness of a reservist's request for leave is irrelevant under Section 2024(d) is in

conflict with the Fifth Circuit's holding in Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981), the Eleventh Circuit's holding in Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987), and the Third Circuit's holding in Eidukonis v. Southeastern Pennsylvania Transportation Authority, 873 F.2d 688 (3rd Cir. 1989). As a result of the conflict, the standards applicable to reservist leave and employment vary from one jurisdiction to the next, a situation Congress surely did not intend, and one which the Fourth Circuit recognized as unfortunate. An authoritative decision by this Court is essential to make uniform the law affecting thousands of reservists and employers governed by the provisions of the Veterans' Reemployment Rights Act.

Monroe v. Standard Oil Company, 452 U.S. 549 (1981) marked this Court's first occasion to address issues arising from the statutory

provisions, codified at 38 U.S.C. Section 2021 et seq., specifically dealing with military reservists. 452 U.S. at 564. In Monroe the Court granted certiorari to consider the petitioner's contention that an employer has a statutory duty to make work scheduling accommodations for reservist employees not made for other employees, whenever such accommodations reasonably can be accomplished. 452 U.S. at 561. The reservist in Monroe worked for an oil refinery which operated 24 hours a day, 7 days a week, and which scheduled its employees to work 5 eight-hour days in a row weekly, but in a different five-day sequence each week, and which, pursuant to a collective bargaining agreement, allowed an employee, with the acquiescence of his foreman and if the change would not require the payment of overtime, to exchange shifts with another employee. The reservist-employee attended training with his reserve unit one weekend a

month, and on a number of weekends he was required to attend training on days he was scheduled to work at the refinery. In most instances he was unable to exchange shifts with another employee and although his employer provided him with leaves of absence to attend training, as required by 38 U.S.C. Section 2024(d), it did not pay him for the hours he did not work, nor did it take steps to permit him to make up those hours by working outside his normal schedule.

In Monroe this Court held that an employer is not required by 38 U.S.C. Section 2021(b)(3) to make work scheduling accommodations for employee-reservists not made for other employees, since Section 2021(b)(3) was enacted for the limited purpose of protecting the employee-reservist against discriminations like discharge and promotion, motivated solely by reservist status. 452 U.S. at 561.

The question presented by the instant petition for certiorari is whether a reservist [illegible] is entitled to military leave, [illegible]

[illegible]

[illegible]

[

his civilian employment rights would continue. Law sought permission a few days before the expiration of his original leave to remain on leave. Permission was denied and Law was eventually discharged. In ruling on Law's suit seeking reinstatement, the district court found for the employer, stating that the period for which leave of absence is given "must be reasonable both in the context of the reservist's military obligation and the requirements of the employer." 614 F.2d at 888. The Fifth Circuit affirmed, noting that Law "completely ignored the difficulties faced by the City in carrying out its important police duties." 614 F.2d at 889.

In Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987), the employee in question was a secretary in the corporate planning department and a medic with the army reserve. She sought a one year leave to participate in a forward practical nurse

training program. When the employer denied the request but realized he would leave with or without its permission, it filed a declaratory judgment action. The district court held that the employee's leave request was unreasonable and that, therefore, said leave did not violate the act in denying the request. On appeal, the Eleventh Circuit reversed, holding that the reservist's request for leave was reasonable. However, the Eleventh Circuit recognized that the employee reservist's leave rights were not absolute, and were subject to the test of reasonableness. 811 F.2d at 1501.

In Eidukonis v. Southeastern Pennsylvania Transportation Authority, 872 F.2d 588, 590 (3rd Cir. 1989), the Third Circuit held "that a standard which evaluates the employee's request for leave and the civilian employer's response on the basis of reasonableness under all of the circumstances is the appropriate one to use under 38 U.S.C. Section 2024(d). In so doing,

the employment relation between employee-reservists and employers was considered significant enough by Congress to warrant protection. Congress' intent to create a uniform standard governing this employment relationship is being frustrated by the conflicting decisions of the Courts of Appeals. A decision by this Court on this important issue is warranted.

Petitioner submits that the Fourth Circuit's disposition of this case by way of summary judgment was erroneous. Triable issues of fact exist concerning the reasonableness of both the employee-reservist's request for leave and the employer's response.

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(1) Pet. at 10a. Additionally, the case was remanded so the District Court could reconsider its findings of fact and conclusions of law in light of the proper standard, taking into consideration the effect of the employee-reservist's request for military leave upon illegitimate business interests of the employer.

Both the District Court (which did not think the impact of military leave on the employer was relevant) and the Court of Appeals failed to give any weight to petitioner's compelling interest in maintaining public safety. In Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981) the Court had to consider the impact on the Pensacola police department and public safety of the absence of one individual officer for six months. The court upheld the employer's right to deny the request for military leave.

Petitioners submitted evidence tending to prove the reasonableness of the policy limiting to one hundred the number of police officers (other than new hires) who are allowed to join active military reserve units. The record contains an affidavit of Police Commissioner Robinson, detailing some of the hardships leading to adoption of the policy in question. The majority of requests for military leave occur during the summer months, and shortages in

manpower within the Department occur when reserve units are called to emergency duty. An increase in the number of officers authorized to join the active reserves has a detrimental effect on the functions of the Department, which is already shorthanded. Additionally, the record contains the affidavit of Colonel Joseph W. Nixon, detailing other hardships. The 126 men on the "100 man" list will increase as newly hired officers who are already members of active units are hired. The only feasible way of controlling increase in membership in the active reserve is to maintain a limit. It is impractical to shuffle officers from district to district to cover manpower shortages occasioned by military leave. Thirty-nine percent of vacation leaves occur during the same summer months when military leaves are most frequently requested. Absences by reservists from small

specialized units, (helicopter, horse, motorcycle, and quick response) justify the Department's policy.

The Baltimore City Police Department justifiably has relied upon the clear policy of limiting the number of officers allowed to join the reserves out of concern over public safety issues. Kolkhorst's employer differs markedly from other employers who have had to deal with employees with military obligations. The Department's policy does not per se violate the VRRA. Its underlying rationale attempts a reasonable accommodation to overcome certain hardships not faced by employers outside the field of public safety.

The differences between the Department and other employers are obvious and dramatic and beg for a different treatment from the approach given private sector employers. First and foremost, the Department exists as a public agency. The major purpose of the agency is to

enforce the laws of the State of Maryland and City of Baltimore, and to ensure that the citizens of Baltimore receive adequate police protection on a 24 hour basis. It is not a for profit entity. The funding for the Department is not generated via profit seeking investors, but simply by tax revenues collected from the general public. The expected return from the taxpayer investment of revenues into the Department is the satisfaction of knowing that the lives and property of the general public will be properly safeguarded by qualified police personnel. The Department, therefore, acts in the best interests of the citizens of the City of Baltimore. These considerations militate in favor of measuring and weighing the interests of the Department in maintaining its policy concerning reserve involvement.

Moreover, the respondent employee-reservist's request for military leave cannot be viewed in isolation, but must be

viewed in the context of the overall cumulative effect that membership in the reserves has on the operation of the police department. The Court of Appeals disregarded these considerations in granting summary judgment.

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1501

ERIC FOLKENFLIK,

Plaintiff-Appellee,

versus

EDWARD TILGHMAN, Commissioner,
Baltimore City Police Department;
BALTIMORE CITY POLICE DEPARTMENT,

Defendants-Appellants,

ELIZABETH H. DOLE, SECRETARY OF
LABOR,

Amicus Curiae.

No. 89-1502

ERIC FOLKENFLIK,

Plaintiff-Appellant,

versus

EDWARD TILGHMAN, Commissioner,
Baltimore City Police Department;
BALTIMORE CITY POLICE DEPARTMENT,

Defendants-Appellees.

ELIZABETH H. DOLE, SECRETARY OF LABOR,

Amicus Curiae.

Before ERVIN, Chief Judge, WILKINSON, Circuit Judge, and YOUNG, Senior United District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Wilkinson and Judge Young joined.

ERVIN, Chief Judge:

Eric Folkhorst ("Folkhorst"), a police officer, brought this action for declaratory and monetary relief against his employer, the Baltimore City Police Department (the "Department"), and Bishop L. Robinson, the Department's Police Commissioner (the "Commissioner"), contending that his right, under 38 U.S.C. Section 2024(d), to become an active member of the Marine Corps reserves was

violated by a Department policy limiting to one hundred the number of police officers (other than new hires) who are allowed to join active military reserve units. The district court granted Kolkhorst's motion for summary judgment, holding that the Department's policy violated Section 2024(d). Accordingly, the lower court entered an order directing the Department to permit Kolkhorst to join an active Marine Corps reserve unit, and awarded damages to Kolkhorst in the amount of $4,164 for lost military benefits which he would have earned had he been allowed to train with an active reserve unit. The Department and the Commissioner now appeal that decision, claiming that the court below erred in construing Section 2024(d). Kolkhorst cross-appeals the amount of damages. The Secretary of Labor filed an amicus brief, arguing that Section 2021(b)(3) of the VRRA makes it unlawful for an employer to discriminate against its employees who want to

serve as active military reservists. For the reasons articulated below, we affirm the decision of the district court in all respects.

I.

The parties are in general agreement regarding the essential facts of this case. Kolkhorst joined the Department in June of 1982. Prior to becoming a police officer, Kolkhorst had served four years on active duty in the United States Marine Corps, during which time he had attained the rank of Captain. Upon his discharge from active duty in 1977, Kolkhorst became a member of the Marine Corps Ready Reserve (the "Ready Reserve"), which is comprised of the Individual Ready Reserve (the "IRR") and the Selected Marine Corps Reserve (the "Selected Reserve"). Although Kolkhorst previously alternated between the IRR and the Selected Reserve, at the time he applied for his position with the Department, Kolkhorst was a member of IRR. All members of the Ready Reserve may be called to active duty

in the event of war, a national emergency or when otherwise authorized by law. The primary distinction between the IRR and the Selected Reserve is that members of the IRR have no required training obligations, although they may participate in training if they wish. In contrast, members of the Selected Reserve must attend monthly drills and participate in an annual two-week training exercise. Thus, when Feldhorst applied for and commenced his job with the Department, he was not a member of an active military reserve unit, and had no drill or camp obligations to satisfy.

As a result of a settlement reached in an earlier and unrelated case, Kundrat v. Somerlesu, No. 79-2908 (D. Md. 1979), the Department, which employs approximately 2000 police officers, established a one hundred person limit on the number of officers who are permitted to join an active military reserve unit. Under the Department's rules, after the

one hundred person limit is reached, other officers who request to join the reserves are placed on a waiting list until an opening occurs. An exception is made for those new hires who, at the time of their application for employment with the department, are members of an active military reserve unit. These individuals are not barred from remaining an active reservist even if the one hundred person maximum has been reached. At the time Feldhorst applied for his job with the department, 125 officers were members of an active reservist unit, and 11 officers were on the waiting list.

When Feldhorst completed his application for employment with the department, he explained his situation to department employees who instructed him to indicate on the form that he was not a member of an active military reserve unit which regularly drilled, and that he had no periodic training obligations. Thereafter, on at least two occasions in December of 1985, Feldhorst

applied for permission from the Department to join an active military reserve unit. The Department failed to respond to these applications, and on February 1, 1980, Kolkhorst accepted a three-year assignment to a Selected Reserve Unit. On February 6, 1980, Kolkhorst again submitted a request for permission to join an active reserve unit. The Department denied this request, but placed Kolkhorst on its waiting list for opening on the one hundred person reservist list. Despite the fact that the Department denied his request, Kolkhorst apparently arranged leaves of absence with his immediate superiors to enable him to train on weekends with his reserve unit. This unofficial arrangement worked well for several months.

In October 1980, however, when Kolkhorst received orders to report to Camp Lejeune in North Carolina for annual military training between July 5 and August 10, 1980, Kolkhorst informed his superior officers in late May of

his upcoming training exercises. Subsequently, the Department began to inquire into Kolkhorst's reserve status, and on July 8, 1986, the Department orally informed Kolkhorst that his request for leave in order to train had been denied. On July 23, 1986, Kolkhorst received a Departmental memorandum directing him to remove himself immediately from active military reserve status. Kolkhorst complied with this directive on the following day.

On October 3, 1986, Kolkhorst brought this suit in the United States District Court for the District of Maryland, claiming that his right to become an active member of a military reserve unit under the Veteran's Reemployment Rights Act, 38 U.S.C. Sections 2021-2026 ("VRRA"), was violated by the Department's policy restricting the number of police officers who were eligible to serve as active reservists. Kolkhorst sought both declaratory and monetary relief. The

parties filed cross-motions for summary judgment, and on June 13, 1988, the lower court granted summary judgment in favor of Kolkhorst. The court held that the "Department's one hundred person limit on the number of officers who may be active reservists was unlawful," and ordered the Department to grant Kolkhorst's request that he be permitted to join the Selected Reserve. By a revised order dated February 15, 1989, the court also awarded Kolkhorst damages totalling $4,164 as compensation for lost income and benefits that Kolkhorst would have earned by participating in reservist training. These appeals followed.

II.

As a preliminary matter, we note that summary judgments and matters of statutory construction are reviewed de novo on appeal. See Higgins v. E.I. DuPont De Nemours & Co., 863

F.2d 1162, 1166-67 (4th Cir. 1988); United States v. Daughtrey, 874 F.2d 213, 218 (4th Cir. 1989). Applying the foregoing standard of review to the legal questions presented by this case, we conclude that the Department's reservist policy is inconsistent with the provisions of 38 U.S.C. Section 2021(b)(3), that the Department's refusal to grant Kolkhorst's request for military training leave violates the broad protections afforded by 38 U.S.C. Section 2024(d), and that an employee may be entitled to compensation for lost pay and benefits under 38 U.S.C. Section 2022 in cases where an employer unlawfully refuses to allow a reservist to participate in military training.

III.

The VRRA provides that any employee of a state, or a political subdivision thereof,

"shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." 38 U.S.C. Section 2021(b)(3). In Monroe v. Standard Oil Co., 452 U.S. 549, 559-60, 101 S. Ct. 2510, 2516-17, 69 L.Ed.2d 226, 235-36 (1981), the Supreme Court reviewed the legislative history of Section 2021(b)(3), and concluded that this provision

> was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion motivated solely by reserve status. Congress wished to provide protection to reservists comparable to that already protecting the regular veteran from "discharge without cause" -- to insure that employers would not penalize or rid themselves of returning reservists after a mere pro forma compliance with Section 2024(d). And the consistent focus of the administration that proposed the statute, and of the Congresses that considered it, was on the need to protect reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations.

Thus, employees covered by Section 2021(b)(3), such as Kolkhorst, may not be discriminated against by their employers or otherwise placed at a disadvantage by them because of their service in the military reserves. In this case, the Department's written order instructing Kolkhorst to either withdraw from the active reserves or face dismissal strikes to the very heart of Section 2021(b)(3)'s prohibition against terminating an employee because of his reservist training obligations. Simply stated, the Department planned to fire Kolkhorst, without cause, if he insisted on exercising his statutory right to train with a military reserve unit. This otherwise unjustified threat of termination represents an impermissible encroachment upon the normal incidents and advantages of Kolkhorst's employment. Accordingly, we hold that the Department's official reservist policy, which clearly precipitated the unlawful measures taken by the Department and the

Commissioner, conflicts directly with the language and purpose of Section 2021(b)(3), and cannot be countenanced thereunder.

IV.

We turn next to the question of whether the Department's refusal to grant Kolkhorst leave for military reservist training constituted a violation of 38 U.S.C. Section 2024(d). That provision of the VRRA provides:

> Any [military reservist] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee:s discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. . . .

38 U.S.C. Section 2024(d). In Monroe, the Supreme Court noted that Section 2024(d) was enacted "to deal with the problems faced by employees who had military training obligations lasting less than three months. This section provides that employees must be granted a leave of absence for training and, upon their return, be restored to their position with such seniority, status, pay, and vacation as they would have had if they had not been absent for training." 452 U.S. at 555, 101 S. Ct. at 2514, 69 L.Ed.2d at 212-13 (1981) (citations omitted).* The issue raised by the parties in this case is whether a standard of reasonableness should be read into Section 2024(d), as has been done by a number of other federal courts.

*At the time Monroe was decided, most reservist training could be accomplished within 90 days. Indeed, the most prevalent form of training for reserve units was, and remains, the two-week summer camp plus monthly drills. Under the current statutory scheme, however, valid leave requests of substantially longer duration

are not uncommon. See, e.g., Ingram, Lemmon, Cronin and Bottger, which are discussed briefly in Part VI of this Opinion.

V.

The reasonableness standard was first applied to 38 U.S.C. Section 2024(d) in Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981), which was decided approximately five months before the Supreme Court's decision in Monroe. In Lee, the Fifth Circuit quoted with apparent approval from the district court's opinion, which concluded:

> Congress [in enacting Section 2024(d)] did not intend thereby to endow a reservist with unreasonable powers over his employer or cause his employer unreasonable hardship. The training period for which leave of absence is given must be reasonable both in the context of the reservist's military obligation and the requirements of the employer.

Id. at 888. Thus, Lee is often cited for the proposition that, despite the unequivocal and unqualified language of Section 2024(d), a reservist is entitled to a leave of absence from

his job in order to participate in military training only if the reservist's request is reasonable with regard to both the employee and the employer. Several jurisdictions have followed Lee and applied a standard of reasonableness under Section 2024(d). See, e.g., Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1468-69 (11th Cir. 1987); Hottger v. Ross Aeronautical Services, Inc., 609 F. Supp. 583, 586 (M.D. Ala. 1985); Anthony v. Basic American Foods, Inc., 600 F. Supp. 352, 355 (N.D. Cal. 1984). The formulation of the standard of reasonableness has varied markedly among these courts, however.

In Anthony, for example, the court held that a reservist's "leave request should be evaluated according to whether it was reasonable both in light of 1) the circumstances giving rise to the request and 2) the requirements of the employer." 600 F. Supp. at 355. In contrast, the Hottger court suggested that the

that "the type, duration and frequency of any particular course of military training must also be presumed reasonable."

II.

We do not believe that reasonableness is required under Section 2024(d). There is nothing in the VRA, its legislative history, or the Manual to indicate that a reservist is entitled to a leave of absence in order to participate in military training only if the request is reasonable based on a judicially created standard that varies from one jurisdiction to the next. Rather, the VRA unconditionally provides that any reservist "shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive-duty training in the Armed Forces of the United States." 38 U.S.C. Section 2024(d) (emphasis added). In Monroe, the Supreme Court emphasized that under Section 2024(d) "employees must be

granted a leave of absence for training and, upon their return, be restored to their position with such seniority, status, pay, and vacation as they would have had if they had not been absent for training." 452 U.S. at 565, 101 S. Ct. at 2514, 69 L.Ed.2d at 211 (emphasis added). In short, the reasonableness standards that have been imposed by other courts are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers.

Even if a standard of reasonableness were applied to Section 2024(d), we believe that Kolkhorst's request for training leave was reasonable and that the Department's policy limiting to one hundred the number of police officers that are eligible to serve as active military reservists is unreasonable per se under any possible formulation of the test. First, Kolkhorst's requested leave for reserve duty was

reasonably made and reasonable in content. He submitted three applications for training leave to the Department. The first request was made more than two months before his training was scheduled to commence, which we conclude was reasonable. Moreover, contrasted against the requests found in other published cases brought under Section 2024(d), the duration of the leave sought by Kolliboust for routine and mandatory training clearly falls within the statute's intended scope.

In Ingram, for example, the reservist requested a one-year leave of absence to attend a voluntary nursing program. The request was held to be reasonable. 811 F.2d at 1466, 1470. In Lee, the reservist had requested and received a seven-week leave of absence to attend an officer training course. A few days before the expiration of the original leave of absence, the reservist applied for and was denied a

five-month extension in order to complete additional parts of the training program. In that case, the supplemental request for leave was deemed to be unreasonable. 634 F.2d at 887-88, 890. In Lemon, the court stated that a three-year leave of absence for purposes of specialized technical training was not inherently unreasonable. 686 F. Supp. at 802. In Cronin v. Police Dept. of the City of N.Y., 675 F. Supp. 847, 855 (S.D.N.Y. 1987), the court held that two consecutive leaves of absence for fourteen and thirteen months respectively for flight engineer training were reasonable. Finally, in Bottger, the court found that a request for a 26-day leave for special training immediately after a two-week leave for routine summer training was reasonable as a matter of law. 600 F. Supp. at 567.

Second, the Department's reservist policy is unreasonable per se because it prevents any active military training at all for individuals

like Kolkhorst who are not on the one hundred person reservist list. In other words, the Department does not even consider the reasonableness of an employee's request for leave if the employee is not one of the one hundred persons eligible for reservist training. By illustration, if all one hundred persons of the Department's reservist list request leave to train during eleven months of the year, and an individual on the waiting list applies for leave in the twelfth month, the request will be denied summarily merely because the employee is not on the approved list, and not because the request is demonstrably unreasonable or places an unreasonable burden on the Department. In other words, the policy presumes that any request for leave made by an individual not on the one hundred persons list is unreasonable. The Department thus asks that this court apply a standard of reasonableness, when its own policy lacks any semblance of reasonableness.

Therefore, if we were to apply a reasonableness standard under Section 2024(d), we would find that Kolkhorst's request for leave was entirely reasonable, and that the Department's arbitrary policy was not.

VII.

Monetary damages as compensation for violations of Section 2024(d) are authorized by 38 U.S.C. Section 2022, which provides that a district court has the power, regarding an employer who violates a person's rights under the VRRA,

> to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions.

38 U.S.C. Section 2022. Kolkhorst argues that the plain language of Section 2022 requires that the failure of an employer to grant a leave request in violation of Section 2024 exposes

that employer to liability for damages sustained by the reservist as a result of the employer's wrongful action. On the other hand, the Department asserts that Section 2022 applies only to wages and benefits which the employee would have earned from an employer, and not to income derived from the employee's military duty. Although there are no published cases directly on point, the express language of Section 2022 seems to accommodate Kolkhorst's claim for damages. That provision states that district courts are empowered to compensate a reservist "for any loss of wages or benefits suffered by reason of such employer's unlawful action." 38 U.S.C. Section 2022 (emphasis added). There is no dispute in this case that Kolkhorst was deprived of military duty pay and privileges when the Department ordered him to resign from the Ready Reserves and precluded him from training with his reserve unit. It should be noted that under the Department's existing

policies, all active reservists are entitled to fifteen days of paid leave per year to train with their reserve units, in addition to whatever vacation leave they have earned. We can see no reason, therefore, why Kolkhorst should not be allowed to recover on his damages claim.

However, Kolkhorst's cross-appeal on the amount of damages is denied because "[t]he trial court, as a fact-finder, possesses considerable discretion in fixing damages, and its decision will be upheld absent clear error." Little Beaver Enterprises v. Humphreys Railways, Inc., 719 F.2d 75, 79 (4th Cir. 1983); Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145, 149 (4th Cir. 1987) (also applying the clearly erroneous standard). We conclude that the award of damages in this case was not clearly erroneous.

VIII.

Based on the foregoing discussion, the judgment of the court below is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ERIC KOLKHORST :

v. : Civil No. JFM-86-3057

BISHOP L. ROBINSON, :
et al.

: : : : : : : : : : : :

OPINION

Plaintiff has instituted this action for declaratory and monetary relief against the Baltimore City Police Department and its Commissioner, contending that the Department has violated 38 U.S.C. Section 2024(d) by denying him permission to become an active member of the Marine Corps Reserves.[1] The Department's denial of plaintiff's request was on the basis of an internal policy limiting to one hundred the number of police officers (other than new hires)

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[1] Plaintiff also asserts a claim under Md. Ann. Code art. 65, Section 42 (1988). Because it finds plaintiff's federal claim to be dispositive, this Court does not reach the state law claim.

who may be active reservists.[2] There was a thirty-three person waiting list for these one hundred slots in February, 1987, when plaintiff made his application.

The parties have crossed-moved for summary judgment.

FACTS

Plaintiff joined the Department in June 1982. He had previously served in the Marine Corps, both on active duty and in the reserves, reaching the rank of captain. At the time he applied to join the Department he was in the Individual Ready Reserve, one of two components of the Marine Corps Ready Reserve. Unlike members of the Selected Marine Corps Reserve (the other component of the Marine Corps Ready Reserve), members of the Individual Ready Reserve have no required regular monthly and

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[2] This policy was formulated in connection with the settlement of a prior suit instituted in this Court, Kundrat v. Pomerleau, No. 79-2198. That suit was not a class action, and defendants do not contend that it is of any binding effect here.

annual training obligations, but they may engage in training if they wish. All members of the Ready Reserve are "liable for active duty" in time of war, national emergency or when otherwise authorized by law.

In a form that he filled out at the time of his application to the Department, plaintiff stated that he was not an active member of the military reserve and that he had no drill or camp obligations. He claims that he explained his situation to departmental employees while he was filling out the personal military history form and that he was told to fill out the form as he did.[3]

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[3] Defendants have submitted an affidavit from one of the police officers with whom plaintiff spoke when he was filling out his form which is consistent with plaintiff's account. In particular, in the affidavit the officer appears to equate active reserve status with being a member of a military reserve unit. As indicated in the text, at the time he filed his application plaintiff was not a member of a reserve unit.

In December 1985 plaintiff applied for permission to join a reserve unit. Neither this request nor one which he made several weeks later was answered. Plaintiff then took matters into his own hands, and on February 1, 1986 he accepted a three-year assignment to a Marine Corps Reserve Unit, an assignment which entailed regular weekend training and annual training of two weeks. On February 4th, plaintiff again submitted a request seeking permission to join a reserve unit. This time he received a response denying his request, pending an opening in the Department's reservist list of one hundred. Despite this denial of his request plaintiff apparently trained on weekends with his local unit for several months, arranging leaves of absence with his immediate superiors.

Matters came to a head following plaintiff's receipt of orders requiring him to report to Camp Lejeune for annual training between July 31 and August 16, 1986. Plaintiff informed his

immediate superiors in last May of the impending training. The Department then made inquiries with the Marine Corps regarding plaintiff's reserve status, and, on July 8, 1986, the Department orally informed plaintiff that his request for leave in order to train would be denied. On July 21, 1986 plaintiff received a memorandum from a senior officer in the Department ordering him "to take whatever action [is] necessary to remove yourself from active military status immediately." The memorandum concluded that "a written statement of compliance with the aforementioned order is required within twenty-four hours of the receipt of this directive." Plaintiff removed himself from active reserve status the next day. In October 1986 he filed this suit.

DISCUSSION

The express terms of 38 U.S.C. Section 2024(d) (1982) unequivocally require an employer to give any military reservist in its employ a

leave of absence to participate in military training and to permit the reservist to return to work under the same conditions which he was under when he took his leave of absence. This mandate is consistent with Congress' declaration that "the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve forces." Act of May 2, 1986, Pub. L. No. 99-250, Section 1(a)(1), 100 Stat. 413, 413. Public employees come within the purview of Section 2024(d), see 38 U.S.C. Section 2021(a)(B)(1982), and the case law is clear that the provisions of Section 2024(d) apply even though

the reservist volunteered for training. See, e.g., Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1469 (11th Cir. 1987); Lee v. City of Pensacola, 634 F.2d 886, 889 (5th Cir. Unit B 1981); Bottger v. Lee Aeronautical Services, Inc., 609 F.Supp. 583, 586 (M.D. Ala. 1985).

Although Section 2024(d) by its terms provides for no exceptions, Courts have used a rule of reason as the lubricant necessary to make the statutory machinery function. This rule was first adopted by the Fifth Circuit in Lee v. City of Pensacola, supra, at 889, and Lee's fundamental holding that reasonableness is the standard by which a reservist's rights and an employer's duties are to be measured has been uniformly accepted by other courts. However, these courts have disagreed as to what factors are to be considered in making the determination of reasonableness. Two courts have held that "the requirements of the employer" may be taken into account in evaluating whether a leave

request should have been granted. See, e.g., Bottger v. Doss Aeronautical Services, Inc., supra, at 586; Anthony v. Basic American Foods, Inc., 600 F.Supp. 952, 955 (n. D. Cal. 1984).[4] The Eleventh Circuit, on the other hand, has held that the burden placed upon the employer by the reservist's leave of absence is not to be considered unless the reservist himself has engaged in "questionable conduct," as did the reservist in Lee. See Gulf States Paper Corp. v. Ingram, supra, at 1470.

This Court has concluded that the approach taken by the Eleventh Circuit is the correct one. Every employer is to some degree burdened by being required to grant leaves of absence to employees. That burden is particularly heavy upon an employer like the Baltimore City Police Department, which employs a substantial number of reservists. However, Congress, acting well

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[4] It is to be noted that, notwithstanding their consideration of this factor, the Bottger and Anthony courts both ruled in favor of the reservist.

within the parameters of its power, has decided and decreed that the interest of national defense requires that employers make the adjustments necessary to allow reservists to participate in regular training. See Monroe v. Standard Oil Co., 452 U.S. 549, 565 (1981). This is not to say that an extremely sound case cannot be made for permitting municipal police departments to limit the percentage of their officers who may be in the active reserves at any one time. It might be said that, at least on a day-to-day basis, police departments are much more immediately involved in protecting the public safety than is the military reserve; their resources might well be needed to maintain order at the very time that an emergency requires the national guard to be called out; and, as the affidavits which defendants have submitted demonstrate, the required granting of numerous leaves of absence poses substantial manpower problems for a police department.

particularly during the summer months when annual reserve training is most frequently conducted. However, these are arguments which can only be addressed to Congress, not to this Court.[5]

The inquiry here must therefore focus solely upon the conduct of plaintiff himself in determining the reasonableness of his leave request. Nothing in the record suggests he has acted unreasonably or in an improper manner. Although at the time that he made his application to the Department he submitted a form indicating that he was not an active member of the military reserve, he has stated (and defendants have not contradicted his statement, see supra note 3) that he fully explained his situation to departmental employees who

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[5] It was not until defendants filed their final memorandum in this case that it became apparent that the Department permits newly-hired officers to serve in the reserves. Defendants have not suggested any principled reason for distinguishing between these officers and officers already on the force.

instructed him to fill out the form as he did. Likewise, although he finally joined a reserve unit without obtaining the Department's permission as required by one of its General Orders, he did so only after he received no response to his requests for permission. In any event, although the Department is entitled to receive adequate notice that an officer intends to join the active reserve, it cannot require by General Order or otherwise that its prior approval for that action be obtained.

For these reasons an order will be entered declaring that the Department's one hundred person limit on the number of officers who may be active reservists is unlawful and directing the Department to grant plaintiff's request that he be permitted to join a Marine Corps Reserve unit. However, plaintiff has cited no authority to support his claim to be paid monetary damages

for the amount of pay which he lost because he was unable to train with his reserve unit, and that claim is denied.

Date:

J. Frederick Motz
United States District Judge

STATUTES

The relevant portions of the Veterans' Reemployment Rights Act, 38 U.S.C. Section 2021 et seq, are as follows:

Section 2021(a)

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period not more than one year -

(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall -

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall -

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

Section 2021(b) (1)

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

Section 2021(b) (3)

(b)(3) Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty

training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer of such employer's successor in interest, such employee shall be offered employment and, if such person so request, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.